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IN THE

Supreme Court of the United States

October Term, 1957

No. 554

CHAIN INSTITUTE, INC., AMERICAN CHAIN & CABLE COMPANY, INC., THE McKAY COMPANY, HODELL CHAIN COMPANY, ST. PIERRE CHAIN CORPORATION, S. G. TAYLOR CHAIN COMPANY, COLUMBUS McKINNON CHAIN CORPORATION, CAMPBELL CHAIN COMPANY, NIXDORFF-KREIN MANUFACTURING COMPANY, PEERLESS CHAIN COMPANY, THE JOHN M. RUSSELL MANUFACTURING COMPANY, INC., TURNER & SEYMOUR MANUFACTURING COMPANY, WESTERN CHAIN PRODUCTS COMPANY, WILLIAM D. KIRKPATRICK, and GEORGE J. CAMPBELL, JR.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SUMNER S. KITTELLE,
15 Broad Street,
New York 5, N. Y.,
Counsel for Petitioners.

MARK F. HUGHES, Esq.,
ALLAN TRUMBULL, Esq.,
STEPHEN H. BEACH, Esq.,
MILTON WEISS, Esq.,
CHARLES DENBY, Esq.,
PAUL J. WINSCHEL, Esq.,
MAURICE F. HANNING, Esq.,
JAMES L. S. BAKER, Esq.,
NORMAN K. PARSELLS, Esq.,
A. CHARLES LAWRENCE, Esq.,
ELMER E. FINCK, Esq.,
HAROLD T. HALFPENNY, Esq.,
FREDERICK B. GERBER, Esq.,
CHARLES FAY, Esq.,
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Material Misstatement of Fact in Respondent's Brief

On page 5 of its brief in opposition, in describing the Commission's findings, the respondent states that each manufacturer used the applicable delivered pricing methods "for the purpose and with the effect of matching delivered prices with other manufacturers at all destinations and thus eliminating competition" (citing pages 604-9 of the record). *Nowhere on those pages or elsewhere in the Commission's findings will any such finding as to the purpose or effects of the delivered pricing methods be found.* As we stated in our petition (p. 13), the normal and *lawful* object of a delivered pricing method is to permit a seller to meet (*i.e.*, match) the lower prices of other sellers whose plants are closer to the customer than his. But this is for the purpose of *enabling him to compete,* not for the purpose of "eliminating competition". The Commission's findings as to the delivered pricing methods were limited to those described in our petition, pages 7-8.

The Commission Did *Not* Give Adequate Consideration to Third Ordering Paragraph or Any Consideration At All to Its Economic Effects

Respondent quotes Commissioner Mead's concurring opinion upon the denial of petitioners' motion for rehearing to the effect that the Commission "considered a number of factors" in deciding on the third ordering paragraph (brief, pp. 8 & 13).[1] But the only *evidentiary* "factor" mentioned by Commissioner Mead was "conscious parallelism" (R. 669). In this respect, Commissioner Mead's opinion on the denial of rehearing in this case stands in sharp contrast to his opinion in the *National Lead* case (49 F. T. C. Dec. 791 at 884), wherein he stated that the selection of the remedy involved the consideration of "many factors, *including the history of the collective activity and the manner in which it originated.*" In the *Lead* case the history of the zone delivered pricing system was that it *originated by agreement.* In the instant case, the origin of each of the delivered pricing methods was entirely *non*-collusive (Pet., pp. 6-7 and maps). The historical factor, deemed so important to the remedy in *Lead*, was given no consideration whatsoever in this case.

In footnote 10, pages 13-14 of its brief, respondent cites the Commission's denial of petitioners' Exception No. 75 as evidence that the Commission considered the deleterious economic effects of enforced f.o.b. mill pricing. Petitioners had included, as paragraph 10(j) of their proposed findings, *evidentiary* findings as to such economic effects (R. 351). In Exception No. 75, however, petitioners excepted not only to the Examiner's failure to make such *evidentiary* findings but also to his failure to include in his recommended decision petitioners' proposed formal conclusion that the law had not been violated[2] (R. 506). In denying Exception No. 75, the Commission mentioned

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[1] Commissioner Mead emphasized that, in his concurring opinion, he was speaking only for himself (R. 669).

[2] Such proposed formal conclusion was in paragraph 11 of petitioners' proposed findings (R. 352).

only petitioners' proposed formal conclusion (of no law violation) *and did not show the slightest consciousness of petitioners' proposed* EVIDENTIARY FINDINGS (R. 574-575). Thus, despite what is said in respondent's brief, the Commission obviously did *not* give any consideration whatsoever to the economic effects of the third ordering paragraph.[3]

The Commission Accepts the Power of a Court of Equity But Not Its Responsibilities

Respondent's argument (brief, pp. 15-16) that it is not required to grant any opportunity to be heard on the form or substance of its orders shows that, while ready to accept the *power* of a court of equity under this Court's decision in the *National Lead* case,[4] it is unwilling to assume the responsibilities of such a court—at least in the instant proceeding. It is the well-established practice of a court of equity in important antitrust cases, after determining that the Government is entitled to injunctive relief, to grant a hearing on the form and substance of its order.[5]

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[3] Since the Commission denied Exception No. 75 only "insofar as [it] pertain[ed] to the Hearing Examiner's *conclusions*", the portion of the exception dealing with the Examiner's failure to make findings as to the economic effects of f.o.b. mill pricing was actually not passed upon at all (R. 575).

[4] *I.e.*, the power to prohibit *lawful* acts where necessary to prevent unlawful ones.

[5] In *United States* v. *U. S. Gypsum Company*, 340 U. S. 76, 85 (1950), this Court held that even if the defendants in a civil antitrust action had no evidence to repel the Government's case of violation of the statute, they nevertheless had the right to lay the facts before the Court that would be pertinent to the Court's decision on the terms of the decree, and extensive arguments were thereafter had in the lower court upon the terms of the decree (C. C. H. Trade Cases 1950-51, pp. 63,700 and 64,504).

Pertinently, 15 U. S. C. A. § 47 empowers Federal equity courts to refer the formulation of recommended antitrust decrees to the Federal Trade Commission. Upon the making of the Commission's report to the Court the parties are expressly allowed to file exceptions thereto "and such proceedings [are to be] had in relation thereto as upon the report of a master in other equity causes."

The Commission here inserted the third ordering paragraph without notice or opportunity to be heard; denied such opportunity when specifically requested by motion for rehearing; and now asserts that due process does not require it ever to grant such a hearing. This attitude is not only contrary to the practice in courts of equity but, as pointed out in Commissioner Carretta's dissent from the denial of petitioners' motion for rehearing (R. 680-681), *is contrary to the Commission's own practice in other cases.*

Principle of *Lead* Case Cannot Be Extended in Disregard of Economic Effects

Respondent argues that since this Court in the *Lead* case gave the Commission power to prohibit the zone system where only the zone system was used, if more than one method of selling is used in an industry in which price-fixing is found, *all* may be prohibited indiscriminately *regardless of the economic consequences.* To demonstrate the fallacy of this argument it is only necessary to ask one question: Suppose in an industry in which price-fixing had been found there was in use, in addition to all the known methods of delivered pricing, a practice of selling certain of the industry's products on a strictly f.o.b. factory basis. Could the Commission validly prohibit not only all delivered pricing but also f.o.b. factory pricing and thereby deprive the affected companies of *all* methods of selling their products?

CONCLUSION

We respectfully submit that a writ of certiorari should be granted to review the three questions presented by our petition, *i.e.*, (1) whether this Court's *Lead* decision justifies the third ordering paragraph *under the economic and other circumstances of the instant case;* (2) whether there

was a denial of due process in the issuance of the third ordering paragraph; and (3) whether a finding of "conscious parallelism" justifies an inference of agreement to continue previously non-collusive delivered pricing methods.

Respectfully submitted,

SUMNER S. KITTELLE,
Counsel for Petitioners.

MARK F. HUGHES, Esq.,
ALLAN TRUMBULL, Esq.,
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